

Thirdly, the marginal note reflects the intention of section 38(1). It is to be noted that section 38(1) provides that the property acquired by the purchaser shall be free from all encumbrances created over it. A potential problem of priority may arise if the property is subject to another first charge created by statute (e.g. the Estate Duty Act) but I do not have to deal with this problem now.

For the above reasons, I made an order in terms of the plaintiffs' application.

Application allowed.

Solicitors: *Drew & Napier; Choo Chan & Partners.*

THYAGARAJAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Chua J.) January 22, 1987]

[Singapore — Magistrate's Appeal No. 187 of 1986]

Immigration — Foreigner overstayed in Singapore — "Employment" of foreigner as barber — "Harbouring" of the foreigner — Whether these charges proved — Immigration Act (Cap. 81), ss. 15(1), 56(1)(d), (e) & 56(1)(ii).

Labour Law — Employment of foreigner as barber — Whether charge proved.

The accused in this case was charged with two offences. The first offence was for employing one Venkatachalam Perumal, who had overstayed in Singapore, as a barber in his shop, an offence under section 56(1)(e) of the Immigration Act (Cap. 81) and punishable under section 56(1)(ii) of the said Act. The second offence was for harbouring the said Venkatachalam Perumal in his shop, an offence under section 56(1)(d) of the said Act and punishable under section 56(1)(ii) of the same Act.

The accused was acquitted on the "employment" charge but was convicted on the "harbouring" charge. He appealed. The main argument of counsel for the appellant was that the trial judge was wrong to infer that Perumal was able to sleep in the appellant's barber shop with the appellant's knowledge and further that the trial judge was wrong in invoking the presumption.

Held, allowing the appeal: (1) for the presumption in section 56(6) to arise the prosecution must prove that the appellant had permitted Perumal to sleep in the barber shop;

(2) there was no evidence that Perumal was permitted by the appellant to stay in the barber shop at night;

A (3) the trial judge should not have invoked the presumption nor should he have inferred that Perumal was able to sleep in the barber shop on occasions with the appellant's knowledge because Perumal on those occasions had the keys to the barber shop.

MAGISTRATE'S APPEAL.

B

S. Rajagopal for the appellant.

Ho Meng Hee (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

C

Chua J.: This is an appeal by the appellant Thyagarajan s/o Ramachandran Pandithar against his conviction on a charge that —

D

"you, from the middle of 1985 to 30th January '86 at a barber shop in Pulau Tekong Army Camp, Singapore did harbour one VENKATACHALAM PERUMAL (M/51) being a holder of Social Visit Pass and who has acted in contravention of section 15(1) of the Immigration Act (Cap. 81) by remaining in Singapore after the expiry of the Visit Pass, and you have thereby committed an offence under section 56(1)(d) and punishable under section 56(1)(ii) of the said Act as amended" (the "harbouring charge").

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The appellant was originally also charged with the offence that —

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"you, from the middle of 1985 to 30th January '86 at a barber shop in Pulau Tekong Army Camp, Singapore did employ one VENKATACHALAM PERUMAL (M/51) as a barber being a person who had overstayed on his Visit Pass in contravention of section 15(1) of the Immigration Act (Cap. 81) and you have thereby committed an offence under section 56(1)(e) punishable under section 56(1)(ii) of the said Act as amended" —

G

of which he was acquitted and discharged (the "employment charge").

H

The prosecution case in respect of both the "harbouring" and "employment" charges rested mainly on the evidence of two material witnesses — Mr. Wong Kong Wa and the subject of the charges, Venkatachalam Perumal (Perumal).

I

Mr. Wong is a Senior Immigration Officer. He said that on January 30, 1986, at about 12.30 p.m. he led a party of Immigration Officers to two barber shops in the Army Camp at Pulau Tekong. At the barber shop in Camp No. 1, he saw Perumal seated in a barber shop. Perumal was alone. Panaiappan Thevarasoo, one of the Immigration Officers, requested for a hair-cut. As Perumal was about to oblige the officers identified themselves and detained him.

From there the party of Immigration Officers went to another barber shop in Camp No. 3 where the appellant and two other alleged overstayers were apprehended. Perumal then identified the appellant as his employer.

Perumal in his evidence confirmed that he was an overstayer at the material time. He had entered Singapore from India on February 4, 1985, and in his passport was an endorsement permitting him to stay in Singapore until February 27, 1985. There was no extension to this visa. He had overstayed in Singapore since February 27, 1985, an offence under section 15(1) of the Immigration Act (the Act).

Perumal said that after he arrived here, he put up at the five-foot way at Serangoon Road. He went round looking for a job. He was a barber in India. He could not get a job for about one month until he met the appellant who offered him a job as a barber in a barber shop at Pulau Tekong. He was paid a salary by the appellant. He was so employed from the middle of 1985 until the date of his arrest.

Perumal said that the appellant took him to Pulau Tekong and showed him his place of work. He was to work in the barber shop at Camp No. 1. Working hours were between 9.30 a.m. and 2 p.m. and 4.30 p.m. to 5.30 p.m. He would eat at the Army canteen — breakfast, lunch and dinner, and that the appellant did not provide food and lodging.

Perumal said that for accommodation, he slept at the jetty at Pulau Tekong once or twice a week; that he slept in the barber shop once in a while if he had the keys and that the rest of the time he returned to the mainland where he would stay with his friend at No. 64, Race Course Road. He said that the appellant did not know that he had slept in the barber shop.

Perumal also testified that the appellant never knew his real immigration status as he (Perumal) had deceived the appellant into believing that he had a valid visa up to August 1985 and which was subsequently extended for another six months. Perumal confirmed that at no time did the appellant examine his passport.

Miss Tng Hak Khoon, the investigating officer, testified that in the course of investigation the appellant did admit he knew that Perumal was an overstayer. However, when suggested to her under

A cross-examination, she was unable to say whether the appellant's knowledge was due to the fact that he was informed by Immigration Officers.

B In respect of the "employment charge" the trial Judge at the end of the prosecution case was of the view that, though the act of employment could not be disputed, there was no evidence to establish the ingredients of knowledge.

The trial judge said in his Grounds of Decision:

C "The prosecution case had absolutely no evidence for me to infer that the accused had employed Perumal knowing that he was an overstayer. There was no equivalent presumption of section 56(6) in respect of the employment charge."

D As regards the "harbouring charge" the trial judge said:

E "As regards the "harbouring charge," there was evidence from the testimony of Perumal that he did sleep in the accused's barber shop at Pulau Tekong, albeit occasionally, between the period from mid-1985 to 30.1.86. These occasions were possible when he had the keys to the barber shop. It can be inferred, therefore, that he was able to sleep in the accused's barber shop with the accused's knowledge."

F And furthermore the trial judge was of the view that the presumption in section 56(6) of the Act applies that the appellant was presumed to have knowingly harboured Perumal at the material time. The trial judge therefore called on the appellant to enter upon his defence.

G The main argument of counsel for the appellant is that the trial judge was wrong to infer that Perumal was able to sleep in the appellant's barber shop with the appellant's knowledge and further that the trial judge was wrong in invoking the presumption.

H For the presumption in section 56(6) to arise the prosecution must prove that the appellant had permitted Perumal to sleep in the barber shop. Perumal's evidence was that he did not live in the barber shop; that he slept at the jetty and at times in the barber shop if he had the keys and rest of the time he returned to the mainland to stay with his friends. The only evidence adduced by the prosecution that Perumal had slept in the barber shop was that from Perumal himself. But there was no evidence that Perumal was permitted by the appellant to stay in the barber shop at night. The trial judge had accepted Perumal's evidence that the appellant did not know of his (Perumal's) immi-

gration status and acquitted the appellant on the "employment charge." He should have accepted Perumal's evidence that Perumal was not provided lodging by the appellant and that the appellant did not know that he had slept in the barber shop. The trial judge should not have invoked the presumption. Nor should he have inferred that Perumal was able to sleep in the barber shop on occasions with the appellant's knowledge because Perumal on those occasions had the keys to the barber shop. Perumal was not asked by the prosecution why he was given the keys. It could be that he was to lock up the barber shop for the night or to open it in the morning when he came to work. The trial judge should not have inferred that Perumal was given the keys by the appellant so that Perumal could spend the night in the barber shop.

For these reasons the appeal is allowed. The conviction and sentence are set aside.

Appeal allowed.

Solicitors: *S. Rajagopal & Co.*

HARRISONS & CROSFIELD (N.Z.) LTD. v. LIAN AIK HANG (SUED AS A FIRM)

[O.C.J. (Lai Kew Chai J.) February 26, 1987]

[Singapore – Suit No. 3645 of 1981]

Sale of Goods – Sale by description – Sale by sample – Sale of peanut kernels – Samples not representative of peanut kernels shipped – Aflatoxin in excess of permissible limit – Breach of implied undertaking – Liquidated claim or damages alternatively – Sale of Goods Act, 1979, s. 15.

By two written contracts contained in telexes in 1980 entered into between the plaintiffs and the defendants, the defendants agreed to sell to the plaintiffs a maximum of 314 metric tons of peanut kernels of 60/70 pieces per ounce TBS (i.e. Thai Brown Skin) to be packed in new jute bags at the price of US\$1,447 per metric ton C & F Auckland, New Zealand. The peanut kernels were to be from the "1980 Thailand Crop" and payment was to be effected by a confirmed irrevocable letter of credit available if the draft and bill of lading were accompanied by (a) a Singapore Government issued Aflatoxin Free Certificate; (b) a Certificate of Crop 1980; and (c) a Certificate that the goods were packed in sound clean bags not previously used for any purpose.

After shipment of the goods, the defendants presented to the advising bank the relevant bill of lading evidencing the shipment, the draft drawn on the plaintiffs, the Fumi-

gation Certificate of the Port of Singapore Authority, their Certificate of 1980 Thailand Crop, the Aflatoxin Free Certificate of the Department of Scientific Services, Singapore, accompanied by a firm of surveyors' certificate that they (the surveyors) had drawn at random a sample for the Department's analysis, the Surveyors' Certificate of Weight and Quality and their Certificate of Inspection. They were duly paid for the consignments.

The present dispute arose when the goods arrived in Auckland by separate shipments. The plaintiffs rejected the goods and alleged that the goods did not correspond with the samples and were of seriously inferior quality. They also alleged that the goods were not from the 1980 Thailand Crop as described but were from an older crop in respect of a large proportion, some 20%, of the peanut kernels. They further alleged that the goods were "unfit for human consumption and were by reason of the mould aflatoxin age and degree of infestation by insects of unmerchantable quality." The defendants disputed these allegations and refused to reimburse the plaintiffs. The plaintiffs obtained an order appointing a Special Examiner for the purpose of taking the evidence of their witnesses in Auckland, bearing on, *inter alia*, the condition of the peanut kernels on arrival, the degree of insect infestation, the level of aflatoxin, and the quality of the peanuts compared with that of the samples. The evidence shows that all the three shipments of peanut kernels contained a high level of aflatoxin, far in excess of the permissible limit of 15 parts per billion. The cause of the problem was the condition of the peanut kernels and the presence of insects before shipment. The plaintiffs claimed the sum of US\$535,244.08, or, alternatively, damages, interest and costs.

Held, allowing the claim: (1) the court was not satisfied that the samples delivered to the Department of Scientific Services were representative of the peanut kernels shipped to the plaintiffs;

(2) the defendants were in breach of section 15 of the Sale of Goods Act, 1979. The sale was a sale by sample, a fact not in dispute, and what was tendered to the plaintiffs consisted some 20% shrivelled peanut kernels and worse, they were not aflatoxin free. All three shipments contained aflatoxin far in excess of the permissible limit of 15 parts per billion;

(3) the defendants were also in breach of the implied undertaking laid down by Diplock J. in *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.* [1961] 1 W.L.R. 862, 865.

(4) judgment will be entered for the plaintiffs in the sum of US\$535,244.08 together with interest thereon at 8% p.a. calculated from January 1, 1982, to date of judgment, with costs to the plaintiffs.

Case referred to:

(1) *Alfred C. Toepfer v. Continental Grain Co.* [1974] 1 Lloyd's Rep. 11.

CIVIL SUIT.

Hiew Hin Chung for the plaintiffs.

Clive Heng for the defendants.

Cur. Adv. Vult.